84-50

No. 84-

Office-Supreme Court, U.S.
FILED
JUL 11 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM R. GLENDON
(Counsel of Record)

JAMES W. PAUL
JOSEPH A. POST

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8110

Attorneys for Petitioners

29pp

QUESTIONS PRESENTED

Petitioners are independent insurers which provide annuity contracts to employees of colleges and universities through insured pension plans. Prior to this Court's decision in *Arizona Governing Committee* v. *Norris*, 103 S. Ct. 3492 (1983), each contribution to those annuity contracts purchased lifetime benefits which differed on the basis of age and sex. In response to this Court's decision in *Norris*, petitioners altered their contracts so that future contributions would purchase lifetime benefits on a sex-neutral basis. Notwithstanding this change over (effective August 1, 1983), the Court of Appeals, on remand in light of *Norris* (103 S. Ct. 3565), ordered that all past contributions, whenever made, must purchase sex-neutral benefits for all persons retiring after May 1, 1980. The questions presented are:

1. Whether an order requiring that all pre-August 1, 1983 contributions to TIAA-CREF must purchase annuity benefits calculated on a sex-neutral basis (thereby reducing the retirement benefits of men) violates the equitable principles governing retroactivity enunciated by this Court in *Norris*.

2. Whether under Title VII, which is applicable only to employers and their agents, relief may be granted against third-party insurers when such insurers have no employer-employee relationship with their annuitants and the annuitants' employer has no control over the insurers' use of mortality tables.

3. Whether the protection from unintended federal intervention into the "business of insurance" provided by

the McCarran-Ferguson Act (15 U.S.C. §§ 1011, *et seq.* (1982)) is limited, in effect, only to federal antitrust legislation.

PARTIES TO THE PROCEEDING

In addition to the petitioners* and respondent listed in the caption, the following were parties in the court below: Long Island University; James P. Corcoran, in his capacity as Superintendent of Insurance of the State of New York (successor to Albert B. Lewis, the former Superintendent of Insurance); the Equal Employment Opportunity Commission (intervenor); and American Association of University Professors (intervenor).

---

* Pursuant to Rule 28.1 of this Court, petitioners state as follows: (1) *Parents*. All of TIAA's capital stock is held by Trustees of TIAA Stock, a not-for-profit, non-stock, New York membership corporation. CREF itself is a not-for-profit, non-stock, New York membership corporation. Seven persons serve both as members of CREF and of Trustees of TIAA Stock. (2) *Non-wholly owned subsidiaries and affiliates*. TIAA owns 50% of the issued and outstanding stock of North Coast Investment Corporation, a Delaware corporation.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iii
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Description of the Parties and the TIAA-CREF Annuity System	3
B. Proceedings Below	5
C. Prior Proceedings in This Court	6
1. Petition for Certiorari in *Spirt*	6
2. Petition for Certiorari in *Peters* v. *Wayne State University*	7
3. The Decision in *Norris* and the Remand of *Spirt* and *Peters*	7
D. TIAA-CREF's Change Over to Sex-Neutral Benefits Derived From Post-August 1, 1983 Contributions	8

PAGE

E. The Decision of the Second Circuit on Remand 8

REASONS FOR GRANTING THE WRIT 10

I. The Court of Appeals Has Misinterpreted This Court's Holding in *Norris* and Wrongfully Reinstated Retroactive Relief in Petitioners' Pension System..... 10

II. A Conflict Exists Between the Circuits As To Whether the Independent Insurers TIAA-CREF Are "Employers" of Their Annuitants Within the Meaning of Title VII 16

III. The Second Circuit's Curtailment of the McCarran-Ferguson Act Should Be Reviewed and Corrected by This Court 18

CONCLUSION 22

TABLE OF AUTHORITIES

Cases PAGE

Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans v. *Norris*, 103 S. Ct. 3492 (1983) ..... *passim*

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 13-14

Cochran v. *Paco, Inc.*, 606 F.2d 460 (5th Cir. 1979) 19-20

Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974) 16

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 12

Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) 21

Henry v. *City of Rock Hill*, 376 U.S. 776 (1964) .. 16

Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 5, 13-17

Mueller v. *Allen*, 103 S. Ct. 3062 (1983) 16

Peters v. *Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *vacated and remanded*, 103 S. Ct. 3566, *remanded*, 718 F.2d 1100 (6th Cir. 1983) 7, 8, 14, 16

Schlude v. *Commissioner*, 372 U.S. 128 (1963) 10

SEC v. *United Benefit Life Insurance Co.*, 387 U.S. 202 (1967) 13

SEC v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959) 20

PAGE

Union Labor Life Insurance Co. v. *Pireno*, 458 U.S. 119 (1982) 16, 21

United States v. *Gaddis*, 424 U.S. 544 (1976) 12

Statutes

McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.* (1982) 3, 5, 6, 18-21

§ 1, 15 U.S.C. § 1011 (1982) 19-20

§ 2(b), 15 U.S.C. § 1012(b) (1982) 3, 18, 19

Portal-to-Portal Act, 29 U.S.C. § 259 (1982) 3, 15

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (1982) ..... *passim*

§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982) 2-3

§ 706(g), 42 U.S.C. § 2000e-5(g) (1982) 15

§ 713(b), 42 U.S.C. § 2000e-12(b) (1982) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

TEACHERS INSURANCE AND ANNUITY ASSOCIATION
and COLLEGE RETIREMENT EQUITIES FUND,

Petitioners,

—v.—

DIANA L. SPIRT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit dated September 29, 1982 (*vacated and remanded*, 103 S. Ct. 3565 (1983)), and the Judgment and Opinion of that Court entered on remand on May 21, 1984, which reinstated and affirmed the Judgment and Opinion of September 29, 1982.

OPINIONS BELOW

The May 21, 1984 opinion of the Court of Appeals (reported at 34 Fair Empl. Prac. Cas. (BNA) 1510) and the September 29, 1982 opinion of the Court of Appeals (reported at 691 F.2d 1054) appear in the separately bound Appendix filed with the Petition.[1] In addition to its Judgment, the District Court issued five opinions in this case (all of which appear in the Appendix): (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (on limited remand; reported at 93 F.R.D. 627).

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was filed on May 21, 1984. This Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Involved herein are:

1. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2(a)(1) (1982)) which in pertinent part provides:

> It shall be an unlawful employment practice for an employer -

---

1 Citations herein to material printed in the Appendix appear as "__a."

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

2. Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1982), which in pertinent part provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

The full text of these provisions, and other relevant portions of Title VII, the McCarran-Ferguson Act, and the Portal-to-Portal Act (29 U.S.C. § 259 (1982)) are set out in full in the Appendix.

STATEMENT OF THE CASE

A. Description of the Parties and the TIAA-CREF Annuity System[2]

Petitioners TIAA and CREF provide a variety of insurance products, principally annuities, for employees of educational and research institutions through insured pension plans. TIAA, a non-profit legal reserve life insurance and annuity company organized under New York law in 1918, offers fixed dollar annuities. CREF, a not-

---

2 The facts were either largely stipulated to or were contained in uncontested affidavits filed by TIAA-CREF. Citations herein to material contained in the Joint Appendix filed below appear as "JA__."

for-profit corporation created in 1952 by a special act of the New York legislature as a companion organization to TIAA, offers variable annuities. 13-15a. Both TIAA and CREF are closely regulated by the New York State Insurance Department and are subject to the New York Insurance Law. JA185.

Respondent Diana Spirt is a tenured professor at Long Island University ("LIU"). Tenured LIU faculty are required to participate in the University's retirement plan which is funded by contributions made, by and on behalf of such faculty, to TIAA and CREF annuity contracts. 13-14a. Those contributions are equal for all similarly situated men and women, and result in equal accumulations at retirement. JA175.

The annuity contracts involved are between each individual participant and TIAA-CREF, not with the employer LIU. JA174. Neither LIU nor any other participating institution has authority or control over the terms of the TIAA-CREF contracts or over TIAA-CREF's mortality tables or rate schedules, which must be submitted to, and receive the approval of, the New York State Superintendent of Insurance. JA174, 180-83. More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. Contributions are immediately vested and credited, as received, to individual accounts established for each employee by TIAA-CREF, from which accounts benefits are ultimately paid. JA175.

TIAA-CREF's studies of its own annuitants' lives, and every other similar study known to them, show that at every age, the male mortality rate is greater than the female mortality rate. JA180-82. At the time the contributions of the men here in issue were made, the annui-

tants' contracts stated that the factors of age and sex would be used by TIAA-CREF in setting the amount of annuitants' retirement benefits. *See, e.g.*, JA497, § 7; JA505, § 7.

Because women live longer than men, if equal periodic benefits are to be paid to all annuitants, an infusion of additional money to pay for women's increased benefits is required. There are only two available sources from which that money may be secured: (1) the employers of the women—by requiring them to pay greater premiums on the women's behalf, or (2) the men in the TIAA-CREF system—by requiring them to surrender a portion of the retirement benefits which they would otherwise receive. JA131-32.

B. Proceedings Below

Plaintiff brought this action in 1974 alleging that TIAA-CREF's use of sex-distinct mortality tables violated, *inter alia*, Title VII and 42 U.S.C. §§ 1981, *et seq.* JA14. The jurisdiction of the district court was invoked under Title VII, as amended (42 U.S.C. §§ 2000e, *et seq.*), the Civil Rights Act of 1870 (42 U.S.C. §§ 1981, *et seq.*), the Fair Labor Standards Act, as amended (29 U.S.C. § 206(d)), and under 28 U.S.C. §§ 1331 and 1343. JA14.

In an opinion dated August 9, 1979, the district court granted summary judgment in favor of TIAA on the ground that the McCarran-Ferguson Act rendered Title VII inapplicable to the subject risk classification activities of that insurer. 64a. Holding that CREF is not engaged in the "business of insurance" within the meaning of that Act, the court applied Title VII to CREF and found that its use of sex-distinct mortality tables violated Title VII under the rationale of *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). The court

enjoined CREF, on and after May 1, 1980, from using sex-distinct mortality tables in calculating the benefits to which participants would be entitled at retirement. Finally, the court also enjoined LIU from contributing, or requiring its employees to contribute, to any retirement plan which used sex-distinct mortality tables in the calculation of periodic benefits. All parties filed notices of appeal from this decision.

In February 1981, Albert B. Lewis, then Superintendent of Insurance of the State of New York, was made a supplemental defendant to this proceeding (then before the district court on limited remand) by reason of his rejection, as inconsistent with New York law, of a merged-gender, *i.e.*, "unisex," mortality table proposed for prospective use by TIAA-CREF. JA442. Plaintiff's complaint against the Superintendent was dismissed by the district court in its opinion of March 19, 1982. 135-36a.

On September 29, 1982, the Court of Appeals affirmed the district court's holding as to CREF, but reversed the finding that the McCarran-Ferguson Act exempted TIAA from Title VII liability. 11a. The Court also held that the required "equalization" in annuity benefits ordered by the district court was not impermissibly retroactive. Such equalization was endorsed even though it was to be accomplished by reducing the benefits of the men derived from contributions made by them in the past.

C. Prior Proceedings in This Court

1. Petition for Certiorari in *Spirt*

On November 9, 1982, TIAA-CREF filed a Petition for Certiorari seeking review of the Second Circuit's Septem-

ber 29 decision. Petitioners also requested that, should the writ be granted, *Spirt* be set down for oral argument on the same date as *Norris*. TIAA-CREF Pet. Cert. at 13. The Court denied this request.

2. Petition for Certiorari in *Peters* v. *Wayne State University*

On October 14, 1982, the Sixth Circuit delivered its opinion in *Peters* v. *Wayne State University*, 691 F.2d 235 (151a), finding, in factual circumstances indistinguishable from those in *Spirt*, that neither TIAA-CREF nor the employer Wayne State University had violated Title VII. The plaintiffs in *Peters* also sought certiorari, and urged the court to grant "in tandem" review of *Peters* and *Norris*. The Court also denied this request.

3. The Decision in *Norris* and the Remand of *Spirt* and *Peters*

On July 6, 1983, this Court held in *Norris* that Arizona's deferred compensation plan violated Title VII and ordered that all benefits derived from post-August 1, 1983 contributions must be calculated on a sex-neutral basis. 103 S. Ct. at 3493. However, this Court refused to order any lifetime annuity benefits derived from pre-August 1, 1983 contributions to be treated in any way other than in the sex-distinct manner hitherto provided for in the Arizona plan, because to do otherwise would be "both unprecedented and manifestly unjust." 103 S. Ct. at 3509 (Powell, J.).

On the same date as its decision in *Norris*, this Court granted the pending petitions for certiorari in *Spirt* and *Peters*, vacated the decisions, and remanded the actions

for further consideration in light of *Norris*. 2a and 103 S. Ct. at 3565, 3566.

D. TIAA-CREF's Change Over to Sex-Neutral Benefits Derived From Post-August 1, 1983 Contributions

Shortly after this Court's decision in *Norris*, TIAA-CREF altered its method of calculating retirement benefits so as to enable the college and university employers with TIAA-CREF funded retirement plans to comply with that decision. 3a. Thus, each contribution applied to TIAA or CREF annuities on or after August 1, 1983 (the effective date of the judgment in *Norris*) has purchased retirement benefits without regard to the sex of the beneficiary. This change in the method of calculating benefits derived from post-August 1 contributions was accomplished through the use by TIAA-CREF of merged-gender mortality tables. Benefits derived from pre-August 1, 1983 contributions continue to be determined on a sex-distinct basis.

E. The Decision of the Second Circuit on Remand

Notwithstanding TIAA-CREF's announced decision to begin paying sex-neutral benefits to the extent derived from post-August 1 contributions, plaintiff and others moved in late July 1983 for reinstatement of the retroactive relief granted in the Second Circuit's pre-*Norris* opinion and judgment. On May 21, 1984, the Second Circuit granted those motions and, with one minor modification, reaffirmed its earlier decision of September 29, 1982. 9a. That decision would, if not reversed, require TIAA-CREF to pay sex-neutral retirement benefits to all persons retiring after May 1, 1980, regardless of when the

contributions from which those benefits are derived were made, even contributions made long before the passage of Title VII.

The court below repeatedly expressed its uncertainty as to *Norris*' intended meaning on the question of relief. 7-8a. Nonetheless, it held that because its decision would impose no burden on the employers in the TIAA-CREF system, *Norris* "did not intend to bar retroactivity in the circumstances of this case," even though that result would "unquestionably have an adverse economic impact" on men, retroactively reducing their benefits by as much as 8%. 7a, 6a.

In so holding, the Court reiterated its earlier stated positions that: (1) the men had no "settled expectations," 8a, as to the exact amount of their monthly benefits and therefore it was not inequitable to reduce those benefits; (2) the "references in TIAA-CREF literature" (*e.g.*, annuity contracts) to the use of male-female mortality tables were "neither so clear" nor "highlighted" to such an extent that the men could have reasonably relied on them, 8-9a; and (3) the "visibility of the issue of the legality of using" sex-distinct tables made any continued reliance on their future use "unjustified," 9a, even for contributions made long prior to *Norris*.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Misinterpreted This Court's Holding in *Norris* and Wrongfully Reinstated Retroactive Relief in Petitioners' Pension System

Norris squarely rejects retroactivity. In remanding *Spirt*, this Court instructed the Second Circuit to reconsider its decision which had granted retroactive relief. Notwithstanding *Norris*, the lower court has reinstated that relief. In so doing, the court failed to apply the fundamental teaching of *Norris* that retroactive relief will not be imposed where inequitable. The court's judgment, if not reversed, will devalue every pre-August 1, 1983 contribution made by hundreds of thousands of male participants in the TIAA-CREF system. While conceding that their decision would "unquestionably have an adverse economic impact" on men, 6a, the Second Circuit concluded that there was nothing in *Norris* to compel a contrary result. In these circumstances, we submit, this Court should exercise its jurisdiction, grant a writ of certiorari and "[bring] the case back once again to consider whether the lower court misapprehended the scope" of *Norris*' holding on relief. *Schlude* v. *Commissioner*, 372 U.S. 128, 130 (1963).

Petitioners believe that this Court established a rule of broad applicability in *Norris* meant to resolve in an unequivocal fashion all remaining disputes over retroactive relief in the pension and insurance industries. The rule is this: All post-August 1, 1983 contributions must purchase sex-neutral benefits; pre-August 1 contributions may be used to purchase sex-distinct benefits. That date was established, we submit, for compliance by "all em-

ployer-sponsored pension plans." 103 S. Ct. at 3510 (Powell, J.).[3] Justice O'Connor's statement of the Court's holding on relief, 103 S. Ct. at 3512-13, specifically joined in by Justice Powell, *id.* at 3510 n.12, addresses all employer-sponsored pension plans:

> I would require *employers* to ensure that benefits derived from contributions collected after the effective date of our judgment be calculated without regard to the sex of the employee. For contributions collected before the effective date of our judgment, however, I would allow *employers* and *participating insurers* to calculate the resulting benefits as they have in the past. (footnote omitted; emphasis supplied)

The Second Circuit, ignoring the breadth of the *Norris* holding, has engrafted a number of exceptions onto the clear and simple rule there announced. Thus, under the Second Circuit's interpretation of *Norris*, only employers or pension plans that would otherwise suffer added financial burdens could avoid retroactivity. 7a. Men, too, might escape a retroactive reduction in their benefits if they were sufficiently certain of how much they would otherwise receive. 5, 8a. And even those men who lacked a sufficiently certain understanding of their future retirement benefits might still avoid retroactivity if the resulting reduction in their benefits were "substantial." 8a.

---

3 Indeed, it would appear that this Court could not have had Arizona's compliance with the *Norris* Judgment primarily in mind in establishing the August 1 deadline—Arizona had removed the deferred compensation plan provision at issue some years before. 103 S. Ct. at 3506 n.4 (Powell, J.).

These "guidelines" for the application of *Norris*' holding are inherently vague, subjective, and amenable to wide variations in application. Attempts to apply the Second Circuit's "rule" will spawn litigation in this arena rather than resolve it. Inconsistent rulings on relief could be anticipated among the cases now pending in a number of lower federal courts against TIAA-CREF and others.[4] This Court should exercise its jurisdiction in order to clarify the uncertainty created by the Second Circuit's misapplication of the clear, simple and equitable rule announced in *Norris*. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 569 (1978); *United States* v. *Gaddis*, 424 U.S. 544, 547 (1976).

Moreover, in arriving at its decision, the court below repeatedly expressed its own doubts as to the proper interpretation of *Norris*. *See, e.g.*, 7a ("Admittedly, the absence from the majority opinion of any mention of the dissent's preferred resolution of the case leaves us somewhat uncertain as to the meaning of the *Norris* decision."). Those doubts led to open speculation below as to

---

4 The following pending cases involving TIAA and CREF contain unresolved issues as to the propriety of granting retroactive relief: *Peters, supra*; *EEOC* v. *Colby College*, No. 75-136 P (D. Me.); *Mich. State Univ. Faculty Ass'n* v. *Mich. State Univ.*, No. G76-640CA5 (W.D. Mich.); *Johnston* v. *Purdue Univ.*, No. L80-4 (N.D. Ind.); *EEOC* v. *Marquette Univ.*, No. 82-C-1578 (E.D. Wis.); *EEOC* v. *Columbia University*, No. 78 Civ. 4420 (S.D.N.Y.); *EEOC* v. *Lewis*, No. 81 Civ. 0881 (S.D.N.Y.); *Bailey* v. *Univ. of S. Calif.*, No. 75 Civ. 3862 (C.D. Cal.). Among cases not involving TIAA-CREF in which the question is raised are: *Hannahs* v. *New York State Teachers' Retirement System*, No. 78 Civ. 2541 (S.D.N.Y.); *Women in City Government United* v. *New York*, No. 75 Civ. 2868 (S.D.N.Y.); *Sobel* v. *Yeshiva Univ.*, No. 75 Civ. 2232 (S.D.N.Y.); *Retired Public Employees Ass'n of Calif., Chapter 22* v. *California*, No. C-77-2008 WHO (N.D. Cal.); *Long* v. *Florida*, No. TCA 82-1056-WS (N.D. Fla.).

the "plausibility" of various interpretations of the three *Norris* opinions, after which the court settled on the narrowest ground possible, limiting *Norris* to its precise facts.[5] Where the court below has admitted its uncertainty as to the scope of the decision of this Court, certiorari should be granted and the court's misunderstanding of the case corrected. *SEC* v. *United Benefit Life Insurance Co.*, 387 U.S. 202 (1967).

Contrary to the decision of the court below, *Norris* does prohibit the entry of retroactive relief against men in the TIAA-CREF system. The touchstone of *Norris*' teaching on relief is fairness and equity: The entry of retroactive relief there was found, in the words of Justice Powell, to be "both unprecedented and manifestly unjust." 103 S. Ct. at 3509. Justice O'Connor, joining the majority on relief, applied the three-part test enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971), in finding retroactive relief to be wholly inappropriate, 103 S. Ct. at 3512: "In my view, [*Chevron's*] third criterion—whether retroactive application would impose inequitable results—compels a prospective decision in these circumstances."

---

5 This Court in *Manhart* rejected an analogous approach urged there, stating (435 U.S. at 722 n.42):

> [W]e cannot base a ruling on the facts of this case alone. As this Court noted in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, equitable remedies may be flexible but they still must be founded on principle. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Id.* at 417.

The third *Chevron* criterion[6] is also manifestly met in the case of the men. If the Second Circuit's decision is allowed to stand, by the court's own calculation, 6a, some 40% of several hundred thousand men in the TIAA-CREF system will lose up to 8% of their accrued retirement benefits. JA720. The rules governing payment of annuity benefits will thus have been changed after the men's contributions have been made, and benefits, previously vested, will be lost.

The cost in lost benefits involved, if those contributions are unisexed, is staggering: Some $2 billion now destined to be paid to men would be shifted to women. *See* JA565. All this would occur without the men having been represented at any level of the proceedings below.[7] This proposed invasion of men's benefits is contrary to the contractual commitment, which existed at the time the

---

6 The first two *Chevron* criteria are also satisfied here. That *Manhart* did not foreshadow a finding of liability for TIAA-CREF and the men in its system is, at a minimum, no less "sufficiently debatable," 103 S. Ct. at 3512 (O'Connor, J.), than was the case in *Norris*. Indeed, as late as October 1982, the Sixth Circuit in *Peters* found no Title VII liability whatever on the part of TIAA-CREF, because those insurers were not "employers" within the meaning of that statute. 154a. As respects the second criterion, imposition of retroactive relief here is not needed as a prod to compliance with the requirements of Title VII as defined in *Norris*: The employers in the TIAA-CREF system have been in compliance with *Norris* since August 1, 1983.

7 TIAA-CREF's motion to have men in its system joined as indispensable parties was denied by the district court. Although the issue was raised on appeal, it was not addressed by the Second Circuit.

contributions here at issue were made,[8] that an annuitant's age and sex would be taken into account in determining benefits. *See, e.g.*, JA497, § 7; JA505, § 7; JA532.

The Second Circuit justified its willingness to reduce the men's benefits because it found that the amount of these benefits was not precisely determinable prior to retirement. 5-6a. The conceded reduction in men's benefits is not made any the less unfair merely because the exact amount of the benefit they would otherwise receive is not known. Moreover, "certainty" in the amount of future annuity benefits provides no basis whatever to distinguish the plan at issue in *Norris* from the plan involved here, as assumed by the court below.[9]

Equity clearly must have a broader meaning in these circumstances than concern solely for the financial well-

---

8 The Second Circuit's inability to perceive the equities of the men is shown by its willingness to devalue contributions made long before the claims advanced by the plaintiff here had any conceivable existence. Thus, that court has ruled that all such contributions must be subject to unisex tables, whether made before the *Manhart* decision, before the 1972 amendments to Title VII making the statute applicable to colleges and universities, or even before passage of the 1964 Civil Rights Act itself. The court's award also thereby violates the "good faith reliance" provisions of Title VII, 42 U.S.C. § 2000e-12(b) (1982) and the Portal-to-Portal Act, 29 U.S.C. § 259 (1982), and the Title VII limitation on awards of back pay, 42 U.S.C. § 2000e-5(g) (1982).

9 The Second Circuit's conclusion that there is a "fundamental difference," 5a, between those two plans as respects "certainty" is plainly wrong. The lifetime benefit levels provided in both plans are dependent upon (a) the amount contributed per year, (b) the number of years one contributes, (c) earnings on amounts contributed, and (d) the annuity payment option selected. *Compare, e.g.*, the Stipulated Statement of Facts contained in the Joint Appendix filed with this Court by the parties in *Norris*, at 12, with TIAA-CREF's annual Report of Annuity Premiums and Benefits, JA380-83.

being of pension plans and employers. Individual male annuitants are also entitled to be treated fairly. If the relief granted below is allowed to stand, it would work an inequity on the men more severe than that present in *Norris*. In these circumstances, this Court should grant certiorari and reverse the Second Circuit's misapprehension of *Norris*' holding on relief. *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964).

II. A Conflict Exists Between the Circuits As to Whether the Independent Insurers TIAA-CREF Are "Employers" of Their Annuitants within the Meaning of Title VII.

In its September 29, 1982 opinion the Second Circuit held that TIAA-CREF must be "deemed" to be an "employer" of the persons they insure (1) by reason of its relationship to the colleges and universities it serves and (2) in order not to frustrate the effectiveness of Title VII. 24-25a. This holding was a necessary predicate to the entry of retroactive relief against TIAA-CREF and the men in its system.

In contrast, the Sixth Circuit's October 14, 1982 decision in *Peters* found the holding of the lower court that TIAA-CREF are employers within the meaning of Title VII to be "clearly erroneous". 154a. Citing *Manhart*, 435 U.S. at 717, the court rejected the suggestion that Wayne State University had delegated responsibility for any aspect of employee compensation to TIAA-CREF or, absent any evidence of control, that TIAA-CREF was the "agent" of Wayne State University. 154a. The Court should exercise its jurisdiction and resolve this conflict, declaring TIAA-CREF not to be employers of their annuitants. *Mueller* v. *Allen*, 103 S. Ct. 3062, 3064 (1983); *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982); *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 190-91 (1974).

The argument that TIAA-CREF is an "employer" is at odds with the express language of Title VII and common sense. TIAA-CREF do not employ their annuitants—the colleges and universities do. Rather, TIAA and CREF, independent insurers with hundreds of thousands of annuitants at colleges and universities throughout the nation, clearly represent "the insurance and pension industries" recognized in *Manhart* as entitled to different treatment under Title VII than that received by the employer-operated plan at issue there. 435 U.S. at 717. Likewise, the college and university employers in no way control the risk classification and ratemaking activities of TIAA-CREF. In specifying that its retirement plan would be funded through TIAA and CREF contracts, the employer here, LIU, did not create an agency relationship between itself and TIAA-CREF, nor did it make a sham delegation of its pension responsibilities to "corporate shells." *Manhart*, 435 U.S. at 718 n.33.

In ignoring these distinctions the Second Circuit has improperly expanded the scope of Title VII and disregarded *Manhart*'s clear statement that "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." *Id.*[10] The conclusions of the two circuits remain in direct conflict on this issue, the resolution of which is fundamental to the applicability of Title VII to petitioners here and to all other insurers. This Court, we submit, should exercise its jurisdiction and resolve this divergence between the circuits concerning the scope of this important federal statute.

---

10 Justice Marshall for the majority on liability in *Norris* quoted the above language from *Manhart*, describing it as a "limitation on the reach of [Title VII]." 103 S. Ct. at 3499.

III. The Second Circuit's Curtailment of the McCarran-Ferguson Act Should Be Reviewed and Corrected by This Court

The court below held that despite the breadth apparent from the words of the McCarran-Ferguson Act, the statute was essentially limited to resolving federal-state regulatory conflicts arising out of the antitrust laws. 28a. In holding that the Act does not prohibit federal regulation of New York insurance companies under post-McCarran civil rights laws such as Title VII, the court has disregarded the policy of the Act, its plain language, and its legislative history. The decision curtails an important federal statute designed to promote state regulation of the insurance industry[11] and protect state interests against unexpressed federal preemption of that important role. A substantial federal question has thus been raised requiring this Court's review.

The Second Circuit's decision has destroyed the certainty that existed within the industry as to the federal-state relationship in the regulation of the business of insurance. The Second Circuit has thus substituted confusion for clarity by entirely exempting from the Act's scope an ill-defined body of federal regulation. The words "No Act of Congress" in the Act have become "Some Acts of Congress," with an enormous potential impact on the insurance industry and state regulation of insurance. Unexpressed and unintended federal regula-

---

11 The interference with New York insurance regulation is clear. The finding by the district court that New York has regulated insurance "in a pervasive manner," and that "within that comprehensive system of regulation discrimination on the basis of sex in computing rates and benefits is considered to be permissible," 64a, stands unchallenged by the Second Circuit decision.

tion can, if this decision stands, now control the insurance industry, although beyond any doubt this would be the exact antithesis of what the Congress intended. We urge the Court to grant review in order to restore McCarran's intended application.

The error in this restrictive application of the Act is obvious in light of its evolution. As Justice Powell pointed out in *Norris*, 103 S. Ct. at 3506-07 n.5: "As initially proposed, the Act had a narrow focus" limited to the Sherman and Clayton Acts. "This narrow version, however, was not accepted," and Congress "adopted a much broader bill" because it recognized that it must remove any questions "as to the general validity of state laws governing the business of insurance." *Id.* Accordingly, the Act "commits the regulation of the insurance industry presumptively to the States." *Id.* Yet the Second Circuit has applied Title VII to the "business of insurance," even though that statute contains no language showing that it "specifically relates" to that "business." In doing so, it has authorized federal interference in a matter left by Congress to State regulation.

Further, the limitation of the statute to the antitrust laws is in conflict with the decision of another circuit court. In *Cochran* v. *Paco, Inc.*, 606 F.2d 460, 463 (5th Cir. 1979), in considering the relationship between the McCarran Act and the Truth-in-Lending Act, the court stated:

> Finally, although the Act was passed primarily in response to *South-Eastern Underwriters*, an antitrust case, there is no doubt that its scope is much broader than the antitrust area. . . . In addition, these two sections [15 U.S.C. §§ 1011 and 1012] speak of

"regulation" of the insurance business, and that term is certainly not limited to antitrust regulation.

An example of the state-federal conflict which McCarran was meant to avoid is present here. The plaintiff and the EEOC sued the New York Superintendent of Insurance because of his disapproval, as inconsistent with New York law, of a merged-gender mortality table proposed for prospective use by TIAA-CREF in 1981. The EEOC seeks to substitute its own views of the proper regulation of these insurers for that of the New York State official specifically charged with that task. The interest of the states in the proper regulation of insurance, the expressed rationale for the Act, *see* 15 U.S.C. § 1011 (1982) (161a), is thus threatened.

The lower court further held, exclusively on the basis of *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65 (1959), that CREF was not engaged in the "business of insurance" because its contracts did not subject it to "investment risk." 16-17a. This result was endorsed despite the fact that TIAA (whose annuities carry a guaranteed return and thus subject it to investment risk) and CREF share common management, engage in the same risk classification and risk spreading activities, and are both closely regulated by the Insurance Department of the State of New York.

The risk classification and risk spreading activities of CREF, moreover, clearly qualify it as being engaged in the "business of insurance" in light of this Court's later

decisions in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 213 (1979), and *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). The interest of the states in the regulation of the business of insurance unfettered by unintended federal intervention[12] would here be best served by application of the Act to CREF as well as TIAA.

The Second Circuit has clearly erred in redrawing the McCarran-Ferguson Act in a manner which not only destroys its purpose but can only result in the erosion of the existing federal-state balance in the regulation of the insurance industry. We believe there is a strong federal interest in resolving the conflict between the circuits and in restoring the obvious meaning intended by Congress in the McCarran Act.

---

12 Former New York Superintendent of Insurance Lewis has termed the prospect that CREF would not be subject to the Act, but rather under the supervision of federal agencies with no insurance expertise, such as the EEOC, an "intolerable" intrusion into that Department's ability to regulate insurers. JA635. The same reasoning would, of course, apply to TIAA as well.

CONCLUSION

For all the foregoing reasons, we urge that a writ of certiorari issue to review the May 21, 1984 and September 29, 1982 decisions of the Second Circuit.

Respectfully submitted,

WILLIAM R. GLENDON
(Counsel of Record)

JAMES W. PAUL
JOSEPH A. POST

ROGERS & WELLS
200 Park Avenue
New York, New York 10166
(212) 878-8110

Attorneys for Petitioners

July 11, 1984